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**Summary record of the 3291st meeting**

Topic:  
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# INTERNATIONAL LAW COMMISSION

## SUMMARY RECORDS OF THE FIRST PART OF THE SIXTY-EIGHTH SESSION

*Held at Geneva from 2 May to 10 June 2016*

### 3291st MEETING

*Monday, 2 May 2016, at 3.10 p.m.*

*Outgoing Chairperson:* Mr. Narinder SINGH

*Chairperson:* Mr. Pedro COMISSÁRIO AFONSO

*Present:* Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

#### Opening of the session

1. The OUTGOING CHAIRPERSON declared open the sixty-eighth session of the International Law Commission.

#### **Tribute to the memory of Boutros Boutros-Ghali, former Secretary-General of the United Nations**

2. The OUTGOING CHAIRPERSON said that the session was beginning on a sad note, owing to the recent death of Boutros Boutros-Ghali, who, before being elected Secretary-General of the United Nations, had served as a member of the Commission from 1979 to 1991. The Commission owed him a debt of gratitude for his commitment to the progressive development and codification of international law and for his service to the Organization.

*At the invitation of the outgoing Chairperson, the members of the Commission observed a minute of silence.*

#### **Statement by the outgoing Chairperson**

3. The OUTGOING CHAIRPERSON said that the consideration of the Commission's report on the work of its sixty-seventh session<sup>1</sup> had constituted the highlight of the Sixth Committee's work at the seventieth session of the

General Assembly. A topical summary of the debate was contained in document A/CN.4/689.<sup>2</sup> The Sixth Committee had continued its practice of complementing formal discussions with an interactive dialogue with those Commission members and Special Rapporteurs who were present in New York. The dialogue, which had also been pursued at meetings with legal advisers, had focused on the topics "Immunity of State officials from foreign criminal jurisdiction", "Protection of the environment in relation to armed conflicts", "Provisional application of treaties" and "*Jus cogens*".

4. Following the Sixth Committee's consideration of the Commission's report, the General Assembly had adopted resolution 70/236 on 23 December 2015, in which it had expressed its appreciation to the Commission for the work accomplished at its sixty-seventh session and had taken note of the final report on the topic "The most-favoured nation clause". The General Assembly had recommended that the Commission continue its work on the topics in the current programme, taking into account the comments and observations of Governments, whether submitted in writing or expressed orally in debates in the Sixth Committee. It had also noted the inclusion of the topic "*Jus cogens*" in the programme of work of the Commission and had encouraged the Commission to continue the examination of the topics in its long-term programme of work. Delegations were interested in further improving the ongoing dialogue between the Sixth Committee and the Commission. In that regard, paragraphs 9 to 12 of the resolution might be of particular interest to the Planning Group.

5. He had represented the Commission at the 50th meeting of the Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe, at which he had provided an overview of the work of the Commission at its sixty-seventh session.

#### **Election of officers**

*Mr. Comissário Afonso was elected Chairperson by acclamation.*

*Mr. Comissário Afonso took the Chair.*

<sup>1</sup> *Yearbook ... 2015*, vol. II (Part Two).

<sup>2</sup> Available from the Commission's website, documents of the sixty-eighth session.

6. The CHAIRPERSON thanked the members of the Commission for the honour they had conferred on him in electing him to chair the current session. He paid tribute to Mr. Singh, Chairperson of the sixty-seventh session, and to the other officers of that session for their outstanding contribution and service.

*Mr. Nolte was elected First Vice-Chairperson by acclamation.*

*Mr. Saboia was elected Second Vice-Chairperson by acclamation.*

*Mr. Šturma was elected Chairperson of the Drafting Committee by acclamation.*

*Mr. Park was elected Rapporteur by acclamation.*

#### **Adoption of the agenda (A/CN.4/688)**

*The agenda was adopted.*

7. Following a brief exchange of views, the CHAIRPERSON suggested that the Enlarged Bureau be convened for consultations concerning the allocation of time to the various items on the Commission's agenda for the session.

*It was so decided.*

*The meeting was suspended at 4 p.m.  
and resumed at 5.05 p.m.*

#### **Organization of the work of the session**

[Agenda item 1]

8. The CHAIRPERSON drew attention to the programme of work for the first two weeks of the Commission's session, which had been drawn up during the consultations.

9. He invited Commission members to consider the recommendation of the Bureau to establish a Working Group on the identification of customary international law, the mandate of which would be to advise the Special Rapporteur in preparing commentaries to the draft conclusions on that topic in preparation for the formal consideration and adoption of the texts by the Commission as a whole later in the current session. Mr. Vázquez-Bermúdez had indicated his willingness to serve as Chairperson of the Working Group. If he heard no objection, he would take it that the Commission wished to establish the Working Group on the identification of customary international law under the chairpersonship of Mr. Vázquez-Bermúdez.

*It was so decided.*

10. Sir Michael WOOD said that the preliminary comments and suggestions of the Working Group would be of great assistance to him in preparing a revised set of draft conclusions and the commentaries thereto. He encouraged Commission members to join the Working Group, while noting that its meetings were also open to those Commission members who did not wish formally to join it.

11. Mr. KITTICHAISAREE said that it would be helpful if the Commission could follow established procedures in determining the composition and mandate of its working groups.

12. The CHAIRPERSON said that the Commission could give consideration to that proposal in the future.

13. Ms. ESCOBAR HERNÁNDEZ said that she was not opposed to the establishment of the Working Group. She considered that the Working Group did not have a mandate to adopt the draft conclusions. However, given that the draft text on which the Working Group would base its comments had been prepared in English only, she wished to reserve the right to make corrections to the Spanish version of the texts of the draft conclusions and commentaries once they had been finalized and submitted for consideration when the Commission adopted its annual report.

14. Mr. HASSOUNA requested further clarification of the Working Group's mandate.

15. Mr. LLEWELLYN (Secretary to the Commission) said that the Working Group on the identification of customary international law would meet to consider an English-language text with a view to helping the Special Rapporteur to formulate, or in some cases, to reformulate draft commentaries and draft conclusions on the topic. The Special Rapporteur would submit the final English-language version of those texts to the Secretariat for translation into all six official United Nations languages. The Commission would then proceed to the consideration and adoption of the texts as part of the relevant chapters of the Commission's annual report to the General Assembly, in accordance with its usual practice.

16. The CHAIRPERSON said he took it that the Commission wished to adopt the proposed programme of work for the first two weeks of the session.

*It was so decided.*

#### **Protection of persons in the event of disasters<sup>3</sup> (A/CN.4/696 and Add.1,<sup>4</sup> A/CN.4/697,<sup>5</sup> A/CN.4/L.871<sup>6</sup>)**

[Agenda item 2]

##### EIGHTH REPORT OF THE SPECIAL RAPPORTEUR

17. Mr. VALENCIA-OSPINA (Special Rapporteur), introducing his eighth report on the protection of persons in the event of disasters (A/CN.4/697), said that the report represented the culmination of seven years of sustained efforts in progressive development and codification by the Commission. In order to facilitate the Commission's second reading of the draft articles, the report summarized

<sup>3</sup> At its sixty-sixth session (2014), the Commission adopted on first reading a set of 21 draft articles and the commentaries thereto (*Yearbook ... 2014*, vol. II (Part Two), pp. 61 *et seq.*, paras. 55–56).

<sup>4</sup> Reproduced in *Yearbook ... 2016*, vol. II (Part One).

<sup>5</sup> *Idem.*

<sup>6</sup> Available from the Commission's website, documents of the sixty-eighth session.

the written and oral comments and observations of more than 100 States, organizations and other international entities on the draft articles, as adopted on first reading.<sup>7</sup> The report also mentioned a number of intergovernmental and non-governmental conferences and meetings, held after the adoption of the draft articles on first reading, that had given considerable attention to the topic of disasters and had referred directly or indirectly to the Commission's draft articles. Relevant events held after the submission of his report included a meeting, in April 2016, of the States parties to the Agreement establishing the Caribbean Disaster Emergency Management Agency, which had specifically included consideration of the Commission's draft articles in its agenda, and the launch of an essay contest on international disaster law, co-sponsored by the International Federation of Red Cross and Red Crescent Societies (IFRC).

18. All the aforementioned activities showed that, within seven short years, the Commission had managed to achieve general recognition of a new branch of international law, namely international disaster response law. The principles and rules underpinning the Commission's draft articles were in fact reflected in a number of texts recently drafted by other bodies. For example, the Inter-Agency Secretariat of the International Strategy for Disaster Reduction, in its written comments and observations to the Commission, had referred to the strong alignment and complementarity between the draft articles and the Sendai Framework for Disaster Risk Reduction 2015–2030,<sup>8</sup> noting that the former articulated the duty to reduce the risk of disasters and to cooperate, and the latter articulated modalities and measures that States needed to adopt to discharge such duty. The draft guide to the law regulating humanitarian relief operations in armed conflict, being prepared by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) in cooperation with Oxford University, confirmed that draft article 14, paragraph 2, according to which consent to external assistance should not be withheld arbitrarily, applied to such operations. Furthermore, in the “Agenda for Humanity” annexed to the report of the Secretary-General for the World Humanitarian Summit, all stakeholders of the Summit were urged, under core responsibility two: uphold the norms that safeguard humanity, to “[c]ondemn any instances of arbitrary withholding of consent or impediment to impartial humanitarian relief operations”.<sup>9</sup> The clear legal repercussions deriving from the mere process of preparing the draft articles on the protection of persons in the event of disasters should constitute a major incentive for the Commission to provide the General Assembly and the whole international community, by the end of the current quinquennium, with a final set of draft articles that followed the course of action mapped out by the Commission at the outset of its work on the topic.

19. With regard to the general comments and observations received by the Commission, he saw no need, at the current advanced stage in the preparation of the draft

articles, to make a recommendation on his approach to the topic, since that had already been essentially adopted by the Commission and widely endorsed by States, organizations and other international bodies. Accordingly, in his eighth report, the Special Rapporteur had not entertained isolated suggestions for changes to the text of draft articles, whether made in a general context or in relation to specific draft articles, where they were intended to revive a largely superseded debate for the purpose of fundamentally altering the Commission's basic approach; or specific suggestions that aimed to disproportionately tilt the delicate balance achieved throughout the text between the paramount principles of sovereignty and non-intervention, on the one hand, and the equally important protection of individuals affected by a disaster, on the other. Instead he had concentrated on concrete suggestions intended to modify the text of specific draft articles as adopted on first reading. A compendium of the preamble and draft articles, as proposed by him on the basis of those suggestions, was contained in the annex to his eighth report.

20. The purpose of many of the comments and observations set out in the eighth report had been to suggest that various textual aspects of the draft articles, as adopted on first reading, should be further clarified in the respective commentaries. He saw merit in many of those suggestions; however, in accordance with the Commission's constant practice, the commentaries could not be drafted until the provisional, and *a fortiori*, final text of the draft articles had been adopted. He would therefore wait for the Commission to adopt the draft articles on second reading in the first part of the current session, before incorporating, as appropriate, into the draft of the accompanying commentaries those suggestions that might still be made within the Commission and those already advanced by States, international organizations and other entities. He would then submit the commentaries to the Commission, which would examine them paragraph by paragraph when it adopted its report. Members could make any linguistic corrections or suggest amendments at that point.

*The meeting rose at 6 p.m.*

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## 3292nd MEETING

*Tuesday, 3 May 2016, at 10.05 a.m.*

*Chairperson:* Mr. Pedro COMISSÁRIO AFONSO

*Present:* Mr. Caffisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

<sup>7</sup> *Yearbook ... 2014*, vol. II (Part Two), pp. 61 *et seq.*, paras. 55–56.

<sup>8</sup> General Assembly resolution 69/283 of 3 June 2015, annex II.

<sup>9</sup> “One humanity: shared responsibility”, report of the Secretary-General for the World Humanitarian Summit (A/70/709), annex, p. 52.